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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1011

SAMUEL BRONSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Dated: New York, N. Y., June 1, 1972.

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals is reported at 453 F.2d 555.*

* The opinion of the Court of Appeals is printed on pages 1-15 of the printed appendix to the petition for a writ of certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1971 (A10).* The petition for certiorari was filed on February 7, 1972 and granted on April 17, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a perjury conviction may be based on true answers by the witness.

2. Whether a perjury conviction may be based on ambiguous questions.

3. The amount and quality of proof needed to sustain a conviction of perjury based on ambiguous questions about events that were several years old, and to which the answers of the witness were true.

Statute Involved

§ 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or cer-

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* References prefixed by "A" are to the appendix and by "PA" to the petitioner's appendix filed at the back of this brief. The prefix "R" refers to the certified record from the Second Circuit. References to the trial record are also prefixed by "Tr. T."; exhibits are identified by their trial exhibit numbers. An appendix of trial exhibits has also been certified to this Court (R. 27).

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tificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995.

Statement

Petitioner Samuel Bronston ("Mr. Bronston") was examined under § 21(a) of the Bankruptcy Act, in a Chapter XI arrangement proceeding relating to the assets of a corporation of which he was the president and sole stockholder. In the course of that examination a creditor's lawyer asked him the following questions and he gave the following answers:

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, sir.

Q. Have you ever? A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.

Q. Have you ever? A. No, sir." (PA 17).

The Government did not dispute the truthfulness of any of these answers. Mr. Bronston had had a personal bank account in Geneva, and the prosecution proceeded on the theory that he committed perjury by not saying so in answer to the second question.

It was undisputed that the Geneva account had been dormant for four years and had been closed two years before the § 21(a) examination, that there were no assets in

the account at the time of the questioning, that the account was not numbered but in petitioner's name and that he had signed checks on it for public use. (R 27, Govt. Exhs. 6, 7; R 35, 1/27/71 Tr. T. 62-63, 65). It was also undisputed that the account was known to the Government because Mr. Bronston had given a waiver of Swiss bank secrecy to his creditors (R 27, Deft. Exh. B; R 35, 1/27/71 Tr. T. 69, 71), one of whom used the waiver to obtain the records of the account and turned them over to the prosecuting authorities. (R 27, Deft. Exhs. A, C, D; R 35, 1/27/71 Tr. T. 69, 71, and 1/27/71 Tr. T. 75-77).

The indictment (A 4-9) contained a second unrelated account of perjury on which Mr. Bronston was acquitted. The jury voted to convict on Count 1, which charged that the above quoted answers constituted perjury, and a divided panel of the Second Circuit affirmed, with Circuit Judge J. Edward Lumbard dissenting. 453 F.2d 555.

Summary of Argument

It is undisputed that petitioner's statement about the company's account was true. If one assumes that the question "Have you ever" referred unambiguously to accounts held by the witness personally, and not by his company, the most that can be said is that the answer was unresponsive.

Thus the first issue presented here is whether it is necessary or desirable for the proper administration of justice that a truthful but unresponsive answer to a question be subject to the criminal sanctions of the perjury statute.

Since an unresponsive answer by a witness may so easily be remedied by the questioner's insistence that the witness give a responsive answer, there is no reason to invoke the drastic sanctions of the criminal law in these circumstances, when the answer is true. Moreover, since

law-abiding citizens who become witnesses in lawsuits or other proceedings are often reluctant to answer questions about their personal affairs or those of their relatives or friends, it would be extremely harsh to subject these individuals to criminal sanctions for giving an unresponsive answer. In addition, to make a felony of a truthful but unresponsive answer would create the possibility of widespread abuses and discriminatory application of the law. (See American Law Institute, Model Penal Code, §208.20, Comments (Tent. Draft No. 6, 1957), pp. 116-118, incorporated by reference in § 241.1 of the 1962 Proposed Official Draft.)

The test of objective truth, which places the burden on the questioner to be precise, has been followed by many cases in other Circuits, as well as by Judge Lumbard in his dissent below. *Galanos* v. *United States*, 49 F.2d 898 (6th Cir. 1931); *United States* v. *Slutzky*, 79 F.2d 504 (3d Cir. 1935); *United States* v. *Wall*, 371 F.2d 398 (6th Cir. 1967). Such a test should be adopted by this Court, and the conviction of petitioner should be reversed.

The crucial question asked of the witness, moreover, was ambiguous and his answer was responsive to one meaning. Ambiguity of the questioning raises the second issue. The 21(a) examination was about a company that was wholly owned by the witness. In the question, "Have you ever" the word "you" could have referred to the company or to the witness personally. To the former meaning the witness's answer was not only truthful but also responsive. Subsequent questions also showed confusion by the witness as to whether the questioner was asking about company bank accounts or his personal bank accounts, but the creditor's lawyer who was asking the questions made no effort to clarify the ambiguity. A perjury prosecution cannot be based on ambiguous questions. *United States* v. *Wall, supra; United States* v. *Lattimore,*

127 F. Supp. 405 (D.C.D.C. 1955), *aff'd* 232 F.2d 334 (D.C. Cir. 1955); *Galanos* v. *United States, supra.*

The third issue arises from an examination of the evidence at trial. Petitioner's personal Swiss bank account, which was in his name and on which he had publicly issued checks signed by him, had been dormant for four years and closed for two years at the time when the questions were asked. There were no assets in it. It had not been treated as a secret, had been opened to discount a commercial note, and petitioner had been willing to give a waiver of Swiss bank secrecy to his creditors some time before the questioning in issue here, through which records of the account were later obtained by a creditor. These facts show the harshness of permitting a conviction based on guesses as to whether the response was subjectively honest, despite its objective truthfulness. The evidence was insufficient to prove perjury under any test that can properly be given to a jury.

ARGUMENT

I. A Perjury Conviction May Not Be Based on True Testimony.

The witness was asked by a creditor's lawyer, in an arrangement proceeding relating to his wholly owned company, if "you" ever had a Swiss bank account. He answered truthfully: "The company had an account there for about six months, in Zurich." He personally had also had an account. The initial question is whether, assuming that "you" referred unambiguously to the witness personally, and that his answer was unresponsive, a perjury conviction may be based on a true answer which is unresponsive. (Whether the question was unambiguous and the answer thus unresponsive will be discussed in Point II, *infra.*)

It appears that the question has never been before this Court. An unbroken line of Circuit Court decisions, before this case, had held that a perjury conviction cannot be based on objectively truthful testimony. *Galanos* v. *United States, supra; United States* v. *Slutsky, supra; United States* v. *Wall, supra.* As Judge Lumbard put it in his dissent below:

> "• • • I believe that once testimony is found truthful there can be no perjury conviction as a matter of law, and the jury is not entitled to consider whether the defendant hoped that a truthful answer would be interpreted in any particular way. Whether Bronston's answer was calculated to mislead the questioner and frustrate the bankruptcy proceedings should not here concern us. We should inquire into his state of mind only to determine whether or not he believed in the truthfulness of his answer." 453 F.2d at 561.

The Sixth Circuit has said, in applying a test of objective truthfulness:

> "Clearly he cannot be convicted of perjury merely because his literally accurate answer might have been somewhat modified in effect if he had been asked to state all the circumstances. Perhaps, if he had been asked specifically, he would have answered truly." *Galanos* v. *United States,* 49 F.2d at 899.

And the Third Circuit has observed:

> "The questions put to him must search for the truth, • • •" *United States* v. *Slutzsky,* 79 F.2d at 505.

The problem presented by an unresponsive answer does not require the drastic sanction of a criminal prosecution for perjury. The cure for an unresponsive answer is to ask another question and to insist on a responsive answer. Where the aim is to develop a proper record, moreover, it

seems more reasonable to put such burden as there is on the lawyer who is asking the questions rather than on the layman who is to respond.

Here, the burden on the lawyer would have been slight. He need only have asked one more question, whether Mr. Bronston personally had had an account. Indeed, it was Mr. Bronston's company that was the party to the arrangement proceeding. He personally was not in any kind of bankruptcy proceeding. He was being asked questions by a lawyer for a creditor of the company, who had the right to ask Mr. Bronston about company affairs. The lawyer also had the right, if he wished, to ask about the personal affairs of Mr. Bronston, the sole stockholder. When the lawyer asked about the existence of Swiss bank accounts he received a truthful answer that the company in the arrangement had had one. If his interest went beyond company accounts, upon receiving an answer about the company, he need only have asked:

> "Have you personally ever had any Swiss bank accounts?"

At that point the witness would have had to answer about his personal accounts, absent a valid claim of privilege, immateriality or the like. Had he denied his personal account at that point the answer would have constituted perjury. But the lawyer did not ask that question and there is no evidence that if petitioner had been asked it he would have lied.

Witnesses are often reluctant to testify about their business affairs, their friends' lives, or other aspects of their private lives which they wish to avoid publicizing. The most law-abiding witness will often want to protect his privacy, and unless the questioner clearly wants to know about such matters he will normally not learn of them. Unresponsive answers are an everyday and common oc-

currence in our courts, our depositions and administrative proceedings. Often the questioner will accept the unresponsive answer, for a variety of reasons. His interest may shift, or he may decide to use a different line of inquiry, or he has what he wants, or he wants to avoid a dispute on relevance, privilege or the like. The witness often does not know why the lawyer fails to press him. Witnesses often do not even know whether their testimony was responsive; they may have misunderstood the question, or have been thinking ahead to another subject, or have expressed themselves poorly. They may be waiting for a precise question and trying to find how far they will be pressed for information. A rule that a truthful but unresponsive answer constitutes perjury opens witnesses to prosecution in every one of these instances, whenever the questioner leaves the unresponsive answer on the record.

The possibilities for abuse and for discriminatory applications of such a test are disturbing. Like other laws which cut too broadly the test of unresponsiveness would apply to so many cases that it would either be unenforced, thus inviting disrespect for the law; or it would be enforced most frequently against those in disfavor.

The American Law Institute, in its comments to the perjury sections of the Model Penal Code, adopted a policy against such prosecutions in its treatment of an analogous problem, arising from *United States* v. *Remington,* 191 F.2d 246 (2d Cir. 1951), *cert. denied* 343 U.S. 907 (1952). (Model Penal Code § 208.20, Comments (Tent. Draft No. 6, 1957), pp. 116-118, incorporated by reference in § 241.1 of the 1962 Proposed Official Draft.)

> "The likelihood of achieving moral reformation by imprisoning one who has, objectively, told the truth is not high. Encouraging the police to inquire as to subjective dishonesty behind the objective truth would not only waste their time, but opens substantial possibility of abuse." (Comments, p. 118)

Under the test of objective truthfulness the law of perjury would protect the sanctity of the oath and the processes of our courts, while its applications would be clear, enforceable and non-discriminatory. To convict an unresponsive but truthful witness of perjury is excessively harsh, and tends to defeat the ends of the law rather than to serve them. We urge this Court to adopt the test of objective truthfulness heretofore followed by most Circuit Judges, and to reverse the conviction below.

II. The Questioning Was Too Ambiguous to Form a Fair Basis for a Charge of Perjury.

Mr. Bronston was being examined about the assets of a company in Chapter XI. Since he was the president and sole stockholder of that company, his own assets could also come into question. After being asked many questions about both the company's assets and his own, the questions in issue were asked.

It may be helpful to look at them again.

> "Q. Do you have any bank accounts in Swiss banks, Mr. Bronston A. No, sir.
>
> Q. Have you ever? A. The company had an account there for about six months, in Zurich.
>
> Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.
>
> Q. Have you ever? A. No, sir." (PA 17).

Then the following questions were asked and the following answers were given.*

---

* This section of the 21(a) examination was never read to the jury. The entire 21(a) examination was marked by the Government and then part of it was read to the jury by the prosecutor, at

(footnote continued on following page)

"Q. Do you have a bank account in Rome at the Banco Commerciale? A. No, sir, I don't have it any more.

Q. Did you at one time? A. We had it there during the period of production of John Paul Jones.

Q. Who is 'we,' the company? A. We made a picture called John Paul Jones.

Q. I know, but was it the company that had the bank account? A. It started with me and then it switched to the company." (PA 17-18).

The word "you" can refer to either a company or an individual. For example, an officer of General Motors, if examined, could be asked: "How many cars did you manufacture in June", referring to the company, or "How long have you been driving", referring to the individual. If he were asked "Have you ever had any Swiss bank accounts", the question could refer to either company accounts or personal accounts.

The lawyer examining Mr. Bronston never made clear the nature of the account about which he was asking. The answer "The company had an account there for about

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(footnote continued from preceding page)

the outset of the trial (R 35, 1/27/71 Tr. T. 56-59). The trial judge apparently assumed that the entire transcript was being treated as in evidence, though some confusion developed on this score when the jury during its deliberations asked for the transcript of the bankruptcy proceeding, and counsel agreed to send in only the questions and answers that had been read, treating only those as in evidence. (R 43, 2/2/71 Tr. T. 33-34). On further reflection, petitioner's counsel took the position before the Court of Appeals that the transcript of the entire 21(a) examination, an official record of the District Court, could properly be judicially noticed by a court when considering the questions of law raised on appeal. The Second Circuit did not rule on the point or refer in its opinion to the questions on the Italian account. We believe that this portion of the 21(a) examination, which immediately follows the four questions on Swiss accounts, may properly be considered by this Court in passing on the issue of whether the questions were ambiguous as a matter of law.

six months, in Zurich" was not only true but took a step to clarify the ambiguity in the questioning. If the questioner wanted to know about personal accounts after such an answer he need only have said so. He did not. Nor did he return to clarify the ambiguity after the immediately following questions on the Roman account must have forcefully brought home the possibility of an ambiguity. To charge the witness with perjury under such circumstances was unfair and such a conviction should not be permitted to stand.

United States v. *Wall*, 371 F.2d 398 (6th Cir. 1967), held that in a situation of this sort, where the question could mean either one of two things, a perjury conviction could not be sustained as a matter of law if the proof simply established a contradiction with one of two meanings.

In *Wall*, the court's description of the charges was:

> "The indictment alleged that she testified falsely before the grand jury as follows:
>
> 'Q. Have you ever been on trips with Mr. X? A. I have not.'
>
> "The indictment further alleged:
>
> 'The aforesaid testimony of defendant Loretta Wall, as she then and there well knew, was not true, in that she had been on a trip with Mr. X in Miami Beach, Florida, from February 14, 1964 through February 20, 1964.' "

The opinion went on to point out that the words "by a trip—on a trip", as defined by the Assistant United States Attorney, "can mean either one of two things: That a person accompanied somebody else travelling with, or it can mean that they were there at a particular place with a person." The court noted that the evidence might have shown that under one of the interpretations the answer

was false, but not under the other. It then went on to hold:

> "The trouble with this case is that the question upon which the perjury charge was based, was inarticulately phrased, and, as admitted by the prosecution, was susceptible of two different interpretations.
>
> "In our opinion, no charge of perjury can be based upon an answer to such a question."
>
> • • •
>
> "This must be so because the essence of the crime of perjury as defined in the statute is the belief of the witness concerning the veracity of his testimony. United States v. Winter, 348 F.2d 204 (2d Cir. 1965), cert. denied 382 U.S. 955, 86 S.Ct. 429, 15 L.Ed.2d 360. In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer." 371 F.2d at 399-400.

See also *United States* v. *Lattimore*, 127 F. Supp. 405 (D.C.D.C. 1955), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955); *Galanos* v. *United States*, 49 F.2d 898 (6th Cir. 1931).

The Second Circuit's decision in this case exposes a witness to a charge of perjury where the fault, if any, lies with the questioner. This Court should adopt the rule in the cases cited above, which is applicable to the facts of the instant case, and reverse.

III. Perjury Was Not Shown on the Whole Record.

The Government's proof at trial was essentially confined to the evidence of an officer of the Geneva bank, testifying with petitioner's consent, who identified the records of the Geneva account. Not only were the peti-

tioner's answers at the 21(a) examination conceded to be true, but the Government did not dispute the facts that the account had been closed for two years, dormant for four and was without assets. It was in petitioner's own name, not a numbered account, and he had publicly issued checks on it, signed by him. The record contained uncontradicted evidence that the account was known to the accountants of the company who were employed when it was active, that it was not treated as a secret (R 34, 2/1/71 Tr. T. 7-10, 20-21), that it was opened as part of an ordinary commercial transaction to discount a note (R 27, Deft. Exhs. H, I, J; R 35, 1/27/71 Tr. T. 63-65, 73-75), and that it was a waiver of Swiss bank secrecy which petitioner had given his creditors which produced the records on which the prosecution relied (R 27, Deft. Exhs. A, B, C, D; R 35, 1/27/71 Tr. T. 69, 71; and 1/27/71 Tr. T. 75-77).

Where answers are true no inference may be drawn from proof of objective falsity that the accused knew his statements to be false. *Cf. United States* v. *Sweig*, 441 F.2d 114, 117 (2d Cir. 1971), *cert. denied* 403 U.S. 932 (1971). Here, moreover, the events to be recalled were old, so that more proof was needed to show perjury than the existence of the account, *Fotie* v. *United States*, 137 F.2d 831 (8th Cir. 1943), which was all that the Government proved. It was significant that the account was without assets, *cf. United States* v. *Mousley*, 201 F. Supp. 510 (E.D. Pa. 1962), *aff'd without opinion*, 311 F.2d 795 (3d Cir. 1963), *cert. denied* 372 U.S. 966, and that it was disclosed by the defendant himself, by his waiver of bank secrecy, *cf. United States* v. *Rose*, 215 F.2d 617, 623-4 (3d Cir. 1954).

The perjury statute should not be construed to permit conviction—for making truthful answers—on such a record as this.

In the Second Circuit the Government argued that it took the creditors three years to obtain the records of the account by using the waiver of bank secrecy. The waiver was given to a creditors' committee on July 30, 1965. (R 35, 1/27/71 Tr. T. 78-79; R 36, 1/29/71 Tr. T. 47-48.) There was no evidence that the creditors' committee sought to use the waiver. The record shows that one creditor knew of the transaction in which the account had been opened in 1959 (R 27, Deft. Exhs. H, I, J; R 35, 1/27/71 Tr. T. 63-65, 73-75), that it was he who in 1966 through counsel asked the questions on which the indictment was based, that he obtained the right to use the waiver in June of 1967, designated an agent to use it on November 14, 1967, retained Swiss counsel and asked the Geneva bank for the records on which this prosecution was based on January 10, 1968, which was almost immediately after he had completed his preparations to use the waiver. (R 27, Deft. Exhs. A, C, D; R 35, 1/27/71 Tr. T. 69, 71; and, 1/27/71 Tr. T. 75-77.)

The Government also argued below that the Geneva account was not specified in the waiver. The waiver on its face, however, was a document intended to open any door to any Swiss bank that the creditors' committee should at any time want to open. There was no evidence that the committee asked for anything else. (R 27, Deft. Exh. B; R 35, 1/27/71 Tr. T. 69, 71.)

The Government argued below that because one of Mr. Bronston's accountants testified he hadn't known of the Swiss account, this was evidence it had been kept secret. But the record was clear that this particular accountant had not worked for the company till after the account had become dormant. (R 36, 1/29/71 Tr. T. 65-68.) The company treasurer, who was with the company when the account was active, testified without contradiction that the account had been known to the company's accounting staff at that time and had never been kept secret (R 34, 2/1/71 Tr. T. 7-10, 20-21).

Though we recognize that this Court does not normally concern itself with reviewing the sufficiency of the evidence, the evidence in this record shows how little there was to the case and underscores the risks of permitting prosecution of witnesses for true answers. Here a witness was asked about bank accounts. His answers were true. The questioner gave no indication that he considered the answer about the company's account to be unresponsive, and he asked nothing further about personal accounts. Petitioner had never kept this personal account secret and had no motive to conceal it. The notion that he was engaged in criminally deceptive conduct is at best conjectural, not rooted in evidence that inspires confidence. Yet it is only such conjecture that stands against the undisputed fact that his answers were true.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed, and that an order should be entered dismissing Count 1 of the indictment.

Dated: New York, N. Y., June 1, 1972.

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PETITIONER'S APPENDIX

Portions of Pages 3, 124 and 125 of Transcript of § 21(a) Examination.

[Page 3]

* * *

Q. Mr. Bronston, you were the president of Samuel Bronston Productions, Inc.? A. Yes, sir.

Q. How long did you hold that office? A. Since the incorporation of the company, sometime in 1959.

Q. And from 1959 to the beginning of 1964, were you the chief executive of the company? A. Yes, sir.

Q. You are familiar with its business? A. Yes, sir.

Q. Is it correct that Samuel Bronston Productions, Inc. acted as a general partner in a number of limited partnerships? A. Yes, sir.

Q. And are those the limited partnerships that are involved in the arrangement proceedings here? A. I presume so.

[Page 124]

* * *

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, sir.

Q. Have you ever? A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.

Q. Have you ever? A. No, sir.

Mr. Palmer: The brother-in-law in Paris who got the $300,000-odd, Verona, Phillips.

Q. Do you have a bank account in Rome at the Banco Commerciale? [Page 125] A. No, sir, I don't have it any more.

Q. Did you at one time? A. We had it there during the period of production of John Paul Jones.

Q. Who is "we," the company? A. We made a picture called John Paul Jones.

Q. I know, but was it the company that had the bank account? A. It started with me and then it switched to the company.

Q. And it remained the company? A. It was dissolved. I think it's closed, because it's too long ago.

• • •